

1 KAREN P. HEWITT
United States Attorney
2 DAVID D. LESHNER
Assistant U.S. Attorney
3 Federal Office Building
880 Front Street, Room 6293
4 San Diego, California 92101-8893
Telephone: (619) 557-7163
5 David.Leshner@usdoj.gov

6 Attorneys for Plaintiff
United States of America
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 ENRIQUE VASQUEZ-VERGARA,

14 Defendant.

) Criminal Case No. 08-CR-1189-JAH
)

) DATE: June 23, 2008
) TIME: 8:30 a.m.
)

) **UNITED STATES' RESPONSE AND**
) **OPPOSITION TO DEFENDANT'S**
) **MOTIONS TO:**
)

) **(1) COMPEL DISCOVERY;**
)

) **(2) DISMISS INDICTMENT; AND**
)

) **(3) OBTAIN LEAVE TO FILE**
) **FURTHER MOTIONS**
)

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19 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
20 Karen P. Hewitt, United States Attorney, and David D. Leshner, Assistant United States Attorney, and
21 hereby files its response and opposition to defendant Enrique Vasquez Vergara's motions to compel
22 discovery, dismiss the indictment and obtain leave to file further motions.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **STATEMENT OF THE CASE**

4 On April 16, 2008, a one-count indictment was filed charging defendant Enrique Vasquez-
5 Vergara with a violation of Title 8, United States Code, Sections 1326(a) and (b). Defendant was
6 arraigned on the indictment on April 17, 2008 and entered a plea of not guilty.

7 **II**

8 **STATEMENT OF FACTS**

9 **A. Defendant's Apprehension**

10 On February 16, 2008, Border Patrol Agent C. Mehmel was performing linewatch duties near
11 Campo, CA, approximately 20 miles east of the Tecate, CA Port of Entry and one mile north of the
12 international border. At approximately 9:20 a.m., Agent Mehmel responded to a seismic sensor device
13 activation in the area. Agent Mehmel followed footprints leading along a foot trail from the sensor's
14 location, and he subsequently encountered five individuals hiding in the brush near the trail.

15 Agent Mehmel conducted field interviews of the five individuals. Defendant admitted to being
16 a citizen of Mexico without documents allowing him to enter or remain in the United States. At that
17 point, Agent Mehmel placed all five individuals under arrest.

18 At approximately 1:13 a.m. on February 17, Defendant received Miranda warnings and agreed
19 to answer questions. Defendant stated that he is a citizen of Mexico and that he did not possess any
20 documents allowing him to enter the United States. According to Defendant, he entered the United
21 States from Mexico on February 16, 2008 by crawling underneath the border fence.

22 **B. Defendant's Immigration History**

23 Defendant is a citizen of Mexico. On or about November 20, 1997, Defendant was removed
24 from the United States to Mexico pursuant to an Order of an Immigration Judge. Defendant
25 subsequently was removed from the United States to Mexico on August 18, 2004.

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C. Defendant's Criminal History

Defendant's criminal history includes the following convictions:

CONVICTION DATE	COURT	CHARGE	TERM
10/1/1990	CASC Santa Barbara	Residential Burglary (Penal Code § 459)	4 years prison
8/11/1999	CASC Ventura	Driving Under the Influence (Vehicle Code § 23152)	60 months probation
4/24/2001	CASC Santa Barbara	Petty Theft with Prior (Penal Code § 666)	364 days jail
2/2/2004	CASC Ventura	Under Influence of Controlled Substance (Health and Safety Code § 11550)	90 days jail
10/3/2005	USDC C. D. Cal	Illegal Entry (8 U.S.C. § 1325)	30 months prison

III

DEFENDANT'S MOTIONS

A. Motion to Compel Discovery

To date, the Government has provided Defendant with 146 pages of discovery and one DVD. The discovery produced includes the Border Patrol report of Defendant's apprehension, Defendant's rap sheet and documents reflecting Defendant's criminal convictions and immigration history. The Government also has produced the audio recording of Defendant's November 1997 deportation hearing. Defendant has not provided reciprocal discovery.

1. Defendant's Statements

The Government recognizes its obligation under Federal Rules of Criminal Procedure 16(a)(1)(A) and 16(a)(1)(B) to provide Defendant the substance of his oral and written statements. The Government has produced all of Defendant's written statements that are known to the undersigned Assistant U.S. Attorney at this date and all available videotapes. If the Government discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or 16(a)(1)(B), such statements will be provided to Defendant.

1 The Government has no objection to the preservation of handwritten notes taken by any of the
 2 Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976)
 3 (agent must preserve their original notes of interviews of an accused or prospective government
 4 witnesses). However, the Government objects to providing Defendant with a copy of any rough notes
 5 at this time. Rule 16(a)(1)(A) does not require disclosure of rough notes where the contents of the notes
 6 have been accurately reflected in a typewritten report. See United States v. Brown, 303 F.3d 582, 590
 7 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not
 8 require disclosure of an agent's handwritten notes even where there "minor discrepancies" between the
 9 notes and a report).

10 The Government is not required to produce rough notes pursuant to the Jencks Act because the
 11 notes do not constitute "statements" as defined by 18 U.S.C. §3500(e) unless the notes: (1) comprise
 12 both a substantially verbatim narrative of a witness' assertion; and (2) have been approved or adopted
 13 by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). Any rough notes in this
 14 case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez,
 15 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where
 16 notes were scattered and all the information contained in the notes was available in other forms). The
 17 notes are not Brady material because they do not present any material exculpatory information or any
 18 evidence favorable to Defendant that is material to guilt or punishment. See Brown, 303 F.3d at 595-96
 19 (rough notes were not Brady material because the notes were neither favorable to the defense nor
 20 material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994)
 21 (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a
 22 future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or
 23 Brady, the notes in question will be provided to Defendant.

24 **2. Arrest Reports, Notes and Dispatch Tapes**

25 The United States has provided Defendant with arrest reports. As noted previously, agent rough
 26 notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery. If the
 27 Government discovers additional reports or tapes that require disclosure under Rule 16(a)(1)(A) or
 28 16(a)(1)(B), this discovery will be provided to Defendant.

1 **3. Brady Material**

2 The Government has complied with its duty under Brady v. Maryland, 373 U.S. 83 (1963) to
 3 disclose material exculpatory information or evidence favorable to Defendant when such evidence is
 4 material to guilt or punishment and will continue to do so. The Government recognizes that its
 5 obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to
 6 impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150,
 7 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to
 8 evidence that was not requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427
 9 U.S. 97, 107-10 (1976). “Evidence is material, and must be disclosed (pursuant to Brady), ‘if there is
 10 a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding
 11 would have been different.’” Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (emphasis added).
 12 The final determination of materiality is based on the “suppressed evidence considered collectively, not
 13 item by item.” Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

14 Brady does not, however, mandate that the Government open all of its files for discovery. See
 15 United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000). Under Brady, the United States is not
 16 required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v.
 17 Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources
 18 (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant
 19 already possesses (see Rector v. Johnson, 120 F.3d 551, 558 (5th Cir.1997)); or (4) evidence that the
 20 undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or control
 21 over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001). Brady does not require
 22 the United States “to create exculpatory evidence that does not exist,” United States v. Sukumolahan,
 23 610 F.2d 685, 687 (9th Cir. 1980), but only requires that the Government “supply a defendant with
 24 exculpatory information of which it is aware.” United States v. Flores, 540 F.2d 432, 438 (9th Cir.
 25 1976).

26 **4. Any Information that May Result in a Lower Sentence**

27 The Government has provided and will continue to provide Defendant with all Brady material
 28 that may result in mitigation of Defendant’s sentence. Nevertheless, the Government is not required to

1 provide information bearing on Defendant's sentence until after Defendant's conviction or guilty plea
2 and prior to Defendant's sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th
3 Cir. 1988) (no Brady violation occurs "if the evidence is disclosed to the defendant at a time when the
4 disclosure remains in value").

5 **5. Defendant's Prior Record**

6 The Government has already provided Defendant with a copy of his rap sheet and conviction
7 documents in accordance with Federal Rule of Criminal Procedure 16(a)(1)(B). To the extent that the
8 Government determines that there are any additional documents reflecting Defendant's prior criminal
9 record, the Government will provide those to Defendant.

10 **6. Any Proposed 404(b) Evidence**

11 Should the Government seek to introduce any similar act evidence, pursuant to Federal Rule of
12 Evidence 404(b), it will provide Defendant with notice of its proposed use of such evidence and
13 information about such bad acts when the Government files its Trial Memorandum.

14 Should the Government seek to introduce any evidence of conviction of a crime pursuant to
15 Federal Rule of Evidence 609, it will provide Defendant with notice of its proposed use of such evidence
16 when the Government files its Trial Memorandum.

17 The Government objects to providing Defendant with complete vehicle and pedestrian crossing
18 reports from the Treasury Enforcement Communications System ("TECS"). TECS reports are not
19 subject to Rule 16(c) because the reports are neither material to the preparation of the defense, nor
20 intended for use by the Government as evidence during its case-in-chief. The TECS reports are not
21 Brady material because the TECS reports do not present any material exculpatory information or any
22 evidence favorable to Defendant that is material to guilt or punishment. If the Government intends to
23 introduce TECS information at trial, discovery of the relevant TECS reports will be made at least by the
24 time of the filing of its trial memorandum.

25 **7. Evidence Seized**

26 The Government has and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant
27 an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within
28 the possession, custody or control of the Government, and which is material to the preparation of

1 Defendant's defense or is intended for use by the Government as evidence in its case-in-chief, or were
2 obtained from or belong to Defendant, including photographs. The Government, however, need not
3 produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir.
4 1984).

5 **8. Preservation of Evidence**

6 The United States will preserve all evidence to which Defendant is entitled pursuant to the
7 relevant discovery rules.

8 **9. Henthorn Material**

9 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and United States v. Cadet,
10 727 F.2d 1453 (9th Cir. 1984), the Government agrees to review the personnel files of its federal law
11 enforcement witnesses and to "disclose information favorable to the defense that meets the appropriate
12 standard of materiality." Cadet, 727 F.2d at 1467-68. Further, if counsel for the United States is
13 uncertain about the materiality of the information within its possession, the material will be submitted
14 to the Court for in camera inspection and review. In this case, the Government will ask the affected law
15 enforcement agency to conduct the reviews and report their findings to the prosecutor assigned to the
16 case.

17 **10. Tangible Objects**

18 Again, the Government has, and will continue to comply with Rule 16(a)(1)(E) in allowing
19 Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence
20 which is within the possession, custody or control of the Government, and which is material to the
21 preparation of Defendant's defense or is intended for use by the Government as evidence in its case-in-
22 chief or were obtained from or belong to Defendant, including photographs. As noted above, however,
23 the Government need not produce rebuttal evidence in advance of trial. United States v. Givens, 767
24 F.2d 574, 584 (9th Cir. 1984).

25 **11. Expert Witnesses**

26 The Government will disclose to Defendant the name, qualifications, and a written summary of
27 testimony of any expert the Government intends to use during its case-in-chief pursuant to Fed. R. Evid.
28 702, 703, or 705.

1 **12. Evidence of Bias or Motive to Lie**

2 The Government recognizes its obligation under Brady and Giglio to provide material evidence
3 that could be used to impeach Government witnesses, including material information related to bias or
4 motive to lie. The Government is unaware of any evidence indicating that any prospective witness is
5 biased or prejudiced against Defendant. The Government is also unaware of any evidence that any
6 prospective witness has a motive to falsify or distort testimony. The Government will produce any
7 evidence of bias or motive of any of its witnesses of which it becomes aware. An inquiry pursuant to
8 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) will also be conducted.

9 **13. Impeachment Evidence**

10 As stated previously, the United States will turn over evidence within its possession which could
11 be used to properly impeach a witness who has been called to testify.

12 **14. Evidence of Criminal Investigation of Any Government Witness**

13 The Government will turn over evidence within its possession which could be used to properly
14 impeach a witness who has been called to testify. Defendant is not entitled to any evidence that a
15 prospective witness is under criminal investigation by federal, state, or local authorities. The
16 Government will, however, provide the conviction record, if any, which could be used to impeach a
17 witness the Government intends to call in its case-in-chief. An inquiry pursuant to United States v.
18 Henthorn, 931 F.2d 29 (9th Cir. 1991) will also be conducted.

19 **15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity**

20 The Government recognizes its obligation under Brady and Giglio to provide material evidence
21 that could be used to impeach Government witnesses including material information related to
22 perception, recollection, ability to communicate, or truth telling. The Government strenuously objects
23 to providing any evidence that a witness has ever used narcotics or other controlled substance, or has
24 ever been an alcoholic because such information is not discoverable under Rule 16, Brady, Giglio,
25 Henthorn, or any other Constitutional or statutory disclosure provision.

26 **16. Witness Addresses**

27 The Government has already provided Defendant with the reports containing the names of the
28 agents involved in the apprehension and interviews of Defendant. A defendant in a non-capital case,

1 however, has no right to discover the identity of prospective Government witnesses prior to trial. See
 2 Weatherford v. Busey, 429 U.S. 545, 559 (1977); United States v. Dishner, 974 F.2d 1502, 1522 (9th
 3 Cir. 1992) (citing United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985)).¹ Nevertheless, in its Trial
 4 Memorandum, the Government will provide Defendant with a list of all witnesses it intends to call in
 5 its case-in-chief, although delivery of such a witness list is not required. See United States v. Discher,
 6 960 F.2d 870 (9th Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987).

7 While the Government will supply a tentative witness list with its Trial Memorandum, it
 8 vigorously objects to providing home addresses. See United States v. Steele, 785 F.2d 743, 750 (9th
 9 Cir. 1986); United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980); United States v. Conder,
 10 423 F.2d 904, 910 (9th Cir. 1970) (addressing defendant's request for the addresses of actual
 11 Government witnesses).

12 The Government also objects to any request that the United States provide a list of every witness
 13 to the crimes charged who will not be called as a United States witness. "There is no statutory basis for
 14 granting such broad requests," and a request for the names and addresses of witnesses who will not be
 15 called at trial "far exceed[s] the parameters of Rule 16(a)(1)(c)." United States v. Hsin-Yung, 97 F.
 16 Supp.2d 24, 36 (D. D.C. 2000) (quoting United States v. Boffa, 513 F. Supp. 444, 502 (D. Del. 1980)).
 17 The United States is not required to produce all possible information and evidence regarding any
 18 speculative defense claimed by Defendant. Wood v. Bartholomew, 516 U.S. 1, 6-8 (1995) (per curiam)
 19 (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory
 20 evidence are not subject to disclosure under Brady).

21 **17. Name of Witnesses Favorable to Defendant**

22 The Government will continue to comply with its obligations under Brady and its progeny. At
 23 the present time, the Government is not aware of any witnesses who have made an arguably favorable
 24 statement concerning Defendant or who could not identify Defendant or who were unsure of
 25 Defendant's identity or participation in the crime charged.

27 ¹ Even in a capital case, the defendant is only entitled to receive a list of witnesses three days
 28 prior to commencement of trial. 18 U.S.C. § 3432; United States v. Richter, 488 F.2d 170 (9th Cir.
 1973) (holding that defendant must make an affirmative showing as to need and reasonableness of such
 discovery).

1 **18. Statements Relevant to the Defense**

2 The Government will comply with all of its discovery obligations. However, “the prosecution
3 does not have a constitutional duty to disclose every bit of information that might affect the jury’s
4 decision; it need only disclose information favorable to the defense that meets the appropriate standard
5 of materiality.” Gardner, 611 F.2d at 774-775 (citation omitted).

6 **19. Jencks Act Material**

7 The Government will comply with its obligations pursuant to Brady v. Maryland, 373 U.S. 83
8 (1963), the Jencks Act, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and Giglio v. United
9 States, 405 U.S. 150 (1972). While the Government is only required to produce all Jencks Act material
10 after the witness testifies, it plans to provide most, if not all, of any Jencks Act material well in advance
11 of trial to avoid any needless delays.

12 **20. Giglio Information**

13 The Government will comply with its obligations pursuant to Brady v. Maryland, 373 U.S. 83
14 (1963), the Jencks Act, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and Giglio v. United
15 States, 405 U.S. 150 (1972).

16 **21. Agreements Between the Government and Witnesses**

17 If the Government makes or attempts to make any agreements with prospective witnesses for
18 any type of compensation for their cooperation or testimony, it will disclose this information prior to
19 trial.

20 **22. Informants and Cooperating Witnesses**

21 This case does not involve confidential informants . However, if the Government determines
22 that there is a confidential informant whose identity is “relevant and helpful to the defense of an
23 accused, or is essential to a fair determination of a cause,” it will disclose that person’s identity to the
24 Court for in camera inspection. See Roviaro v. United States, 353 U.S. 53, 60-61 (1957); United States
25 v. Ramirez-Rangel, 103 F.3d 1501, 1505 (9th Cir. 1997).

26 **23. Bias by Informants or Cooperating Witnesses**

27 As noted above, the Government recognizes its obligation under Brady and Giglio to provide
28 material evidence that could be used to impeach Government witnesses, including material information

1 related to bias or motive to lie.

2 **24. Reports of Examinations and Tests**

3 The United States will comply with its obligations under Rule 16(a)(1)(F) with respect to
4 examinations or scientific tests.

5 **25. Residual Request**

6 The Government has complied with Defendant's residual request for prompt compliance with
7 Defendant's discovery requests and will continue to do so.

8 **B. Motion to Dismiss Indictment**

9 Defendant concedes that controlling Ninth Circuit precedent forecloses his arguments. See
10 United States v. Rivera-Sillas, 417 F.3d 1014 (9th Cir. 2005). No further discussion is necessary.

11 **C. Leave To File Further Motions**

12 The Government does not oppose granting both parties leave to file further motions so long as
13 those motions are based on information not currently available to the parties.

14
15 **IV**

16 **CONCLUSION**

17 For the foregoing reasons, the Government respectfully requests that the Court deny Defendant's
18 motions for discovery and to dismiss the indictment.

19
20 DATED: June 5, 2008.

Respectfully submitted,

21 Karen P. Hewitt
22 United States Attorney

23 s/ David D. Leshner
24 DAVID D. LESHNER
25 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 08-CR-1189-JAH
)	
Plaintiff,)	
)	
v.)	
)	CERTIFICATE OF SERVICE
ENRIQUE VASQUEZ-VERGARA,)	
)	
Defendant.)	

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age.
My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO: (1) COMPEL DISCOVERY; (2) DISMISS INDICTMENT; AND (3) OBTAIN LEAVE TO FILE FURTHER MOTIONS** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Leila Morgan, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2008.

/s/ David D. Leshner
DAVID D. LESHNER